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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 706

THE PITTSBURGH NATIONAL BANK,
Executor of the Estate of
Frank E. Mower, deceased,
Petitioner,

vs.

EQUITABLE GAS COMPANY,
a corporation.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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CITATIONS

Brinkerhoff-Faris Co. v. Hill,
281 U.S. 673 (1930) 2

Great Northern Ry. Co. v. Sunburst
Oil & Ref. Co., 287 U.S. 358 (1932) 3

Griggs v. Allegheny County,
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Pennsylvania Coal Co. v. Mahon,
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United States v. Causby,
328 U.S. 256 (1946) 3

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I.

Respondent's "Questions Presented," as well as the remainder of its brief in opposition, misconceive the issue presented in this case and raised in the petition for a writ of certiorari. In its first two "questions presented" respondent raises the question whether an "abutting property owner" is entitled to damages when a gas pipeline is laid "wholly within a public highway." This might have been the issue had the state originally acquired a fee interest in the land on which Beatty Road lies. But it is conceded that it did not do so. To the contrary, the state's

right is only the right of an easement holder. The land on which the Beatty Road easement lies is petitioner's decedent's land. The gas pipeline in question was not laid "wholly within a public highway"—it was laid on petitioner's decedent's land and the state's easement concededly did not at the time it was acquired give the right to lay the pipeline. Such a right did not exist until the decision of the court below, which, for the first time, held that the state's easement had grown to include rights not acquired or paid for when the easement was initially established.

II.

Respondent attempts to pass off petitioner's constitutional claim as amounting to an assertion of vested rights in a rule of law represented by prior decisions of the Supreme Court of Pennsylvania overruled in the instant case. Petitioner's case has no such foundation. Rather, it rests on the principle that the state cannot, by overruling past decisions of its courts or otherwise, occupy and use privately-owned land for which it has not paid just compensation. And this principle cannot be compromised merely because "new conditions and concepts created by the progress of society" make it desirable that the state or its agent occupy and use private property.

This principle is sustained by the cases cited and relied on by respondent for the undisputed but irrelevant proposition that retroactive overruling of old cases by a state court does not per se violate the federal constitution.

Thus, in *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673 (1930), quoted at length by respondent at pages 14-15 of its Brief in Opposition, this Court held that a state court could not, consistent with the federal constitution, bar a suit to enjoin collection of taxes on the ground of failure to exhaust administrative remedies when past state decisions had made clear that the administrative remedy was not available. The court held that the retroactive

application of the new doctrine deprived the suitor of property without due process of law.

In *Great Northern Ry. v. Sunburst Oil and Refining Co.*, 287 U.S. 358 (1932), this Court observed that the case did not involve retroactive application so as to impair previously existing rights; the Court made clear that if the opposite had been true it would have invalidated the retroactive application. Similarly, in *Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924), retroactive application of the challenged decision did not interfere with existing rights and the Court's opinion states only that a constitutional claim may not be based on the "*mere* fact of retroactivity." And in *Sauer v. City of New York*, 206 U.S. 536 (1907), the Court's decision rests on the fact that no property rights were violated since petitioner *"never owned the easements which he claimed."* (At p. 548, Emphasis supplied.) [1]

In short, the cases cited by respondent are entirely consistent with the principle asserted by petitioner — that a state may not by judicial decision retroactively expand its interest in private property to include rights not previously acquired or paid for.[2] Any expansion of a state's rights in private property must be accomplished by payment of just compensation to the deprived property owner.

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[1] The additional cases cited in this section of respondent's brief (*United States v. Fox*, 94 U.S. 315 (1886); *United States v. Burnison*, 339 U.S. 87 (1950)) stand only for the proposition that state courts are generally empowered to formulate state real property law.

[2] Respondent attempts unsuccessfully to distinguish the cases cited in the petition. It describes *Pennsylvania Coal Co. v. Mahon* as involving the destruction of existing property rights, but it is difficult to perceive how that makes it different from the present case. *United States v. Causby* and *Griggs v. Allegheny County* are explained on the ground that the state had no easement over the properties there involved. But in the present case the state had no easement in or right to invade the land in which the gas pipeline was laid.

This is precisely what the Supreme Court of Pennsylvania denied petitioner in this case.

Petitioner respectfully urges that the petition for a writ of certiorari be granted.

Respectfully submitted,

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